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No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Petitioners,

v.

ALLIED INTERNATIONAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 102 national and international unions with a total membership of approximately 14,500,000 working men and women, files this brief *amicus curiae* in support of the position of the petitioners, with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

The First Circuit's decision in this case conflicts with a succession of decisions of this Court—including *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Incres S.S. Co.* v. *Maritime Workers*, 372 U.S. 24 (1963); *Windward Shipping* v. *American Radio Assn.*, 415 U.S. 104 (1974) (*Windward*), *and American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U.S. 215 (1974) (*Mobile*)—holding that the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act") does not reach union activity arising from a foreign dispute when such activity might substantially intrude into the field of international relations. In order to affirm the decision below, this Court must overrule its prior decisions; in order to adhere to its earlier decisions, the Court must reverse the First Circuit's decision. The one result that would be contrary to both precedent and principle would be to decide that the union always loses in such cases—to affirm the decision below without overruling the *Benz-Mobile* line of cases. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) participated as *amicus curiae* in *Sociedad Nacional*, *Windward*, and *Mobile*. In each instance, this *amicus* has urged that the Act be read to reach the dispute in accordance with the terms of the Act and the unquestioned scope of Congress' constitutional authority. Absent countervailing considerations, therefore, this *amicus* would support the interment of this line of cases and not urge reversal, on jurisdictional grounds, of the First Circuit's decision in this case. Because none of the parties, however, is urging that these precedents be overruled, we shall confine our discussion to showing that, on the present state of the law, the judgment below may not stand.

The controversy in this case arose from the Union's disapproval of the Soviet invasion of Afghanistan. That disapproval was manifested by a refusal to unload cargo originating in the Soviet Union. It is beyond question,

first, that the basic dispute—whether viewed as the Union's disapprobation of Soviet aggression, or the Soviet-Afghanistan conflict itself—prompting the Union's action was a matter well outside "commerce" within the meaning of the Act and, second, that the Union's response had potential international ramifications of substantial magnitude. In these circumstances, this Court's decisions in *Windward* and *Mobile* unequivocally establish that the Act does not reach the Union's conduct, even insofar as that conduct affected domestic employers.

1. *Windward* involved picketing by American maritime unions directed against foreign ships owned by foreign corporations and manned by foreign nationals, who were represented by foreign unions. The unions' activity called attention to the competitive difference between foreign and domestic seamen's wages, and to the resulting impact on American job opportunities and wage standards. Longshoremen and other port workers honored the picket lines and declined to load and unload the picketed ships. In holding that the Act did not regulate the unions' conduct, and thus did not preempt an action brought under state law in state court by the foreign shipowners, this Court set out the principles that govern this case.

As a preliminary matter, this Court observed that Congress had expressed no "affirmative intention" that the Act should be invoked "to run interference in [the] delicate field of international relations . . . where the possibilities of international discord are so evident and retaliative action so certain." 415 U.S., at 110-111 (quoting *Benz* v. *Compania Naviera Hidalgo*, 353 U.S., at 147). In this field, the "term 'in commerce,' as used in the LMRA" must not be "literally" applied, lest the Act reach activities significantly affecting international trade and foreign relations. 415 U.S., at 112-113. See also *McCulloch* v. *Sociedad Nacional, supra.*

In determining that the union activity in *Windward* was not "in commerce," within the meaning of the Act, the Court looked to the basis of the underlying dispute

and to the possible international ramifications of the unions' activity to ascertain whether that activity substantially intruded, or threatened to intrude, into international maritime trade so as to exceed the reach of the Act. With respect to the character of the underlying dispute, the Court observed that the unions' activity "protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States." *Id.*, at 114. The dispute thus concerned matters taking place outside this Country, directly involving foreign nationals, unlike a "dispute center[ing] on the wages to be paid American residents [by owners of foreign ships]," which previously had been held covered by the Act. *Id.*, at 112; see *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195 (1970).

With respect to the potential international consequences of the union activity, the Court explained that the unions' underlying concerns regarding the competitive advantage of foreign vessels could not be accommodated by some adjustment to wages paid to American workers, but only by a large-scale increase in operating costs incurred by foreign ships, which "would have more than a negligible impact" on the maritime operations of these vessels. The Court elaborated, 415 U.S., at 114-115:

> A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predict-

> able responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.

The Court thus concluded that the labor activity in question was beyond the scope of the Act because the issue giving rise to that activity—the payment by foreign shipowners of substandard wages to foreign seamen—was not limited to essentially domestic labor relations, and because the union activity had significant potential repercussions for international trade and international relations.

2. In *Mobile*—which involved the same maritime unions that were parties in *Windward*, the same kind of union activity, the same underlying dispute, and the same resulting refusal by stevedore workers to cross the unions' picket lines—this Court confirmed that the Act left unregulated not only the controversy between the unions and the foreign shipowners against whom the union activity was directed, but also the related interference with the businesses of American employers. The litigation in *Mobile* was commenced in state court by domestic stevedoring companies that sought to service the picketed foreign ship and by a domestic shipper who wished to have his crops loaded on it. The gravamen of the state court complaint was that the unions had induced employees of the neutral domestic plaintiffs to cease performing work, and thus had wrongfully interfered with the plaintiffs' pursuit of their lawful business activities. Because the elements of the state claim essentially coincided with the elements of a claim under the secondary boycott provision of the Act, § 8(b)(4), 29 U.S.C. § 158(b)(4), the question arose whether that section arguably prohibited the unions' activities, and accordingly preempted the state court proceedings.

In approaching this question, the Court emphasized the necessity of confronting the threshold issue whether the

jurisdictional requirements of the Act had been met, 419 U.S., at 221:

> Even if there is a dispute between [the unions] and [the domestic employers] which is, in some semantic sense, independent of [the unions'] dispute with foreign-flag ships, that dispute is subject to state-court disposition unless it satisfies the jurisdictional requirements of the NLRA.

A "necessary predicate for a finding . . . of an unfair labor practice under § 8(b)(4)," the Court explained, was that the challenged labor activities be activities affecting "commerce." *Ibid.*

This Court refused to read *Windward* as standing for "nothing more than . . . that the *maritime operations of foreign ships* are not 'in commerce.'" *Ibid.* (Emphasis supplied.) The inquiry in *Windward* was directed at determining whether "the *activities . . . complained of*" were in "commerce" within the meaning of the Act. *Ibid.* (Emphasis supplied.) In *Windward*, the Court had examined the nature of the underlying dispute and the potential international ramifications of the unions' activities, as discussed above, and had determined that Congress did not intend to reach those activities through the federal labor laws. The fact that the unions' actions affected domestic employers—indeed, the fact that cessation of work by American stevedores and interference with the business of American exporters "was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," *id.*, at 224—did not alter the character of the primary dispute or lessen the potential implications of the labor activity for international trade or foreign relations, which together served to remove the activity from the coverage of the Act. Thus, in *Mobile*, this Court held that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in

Windward." *Id.*, at 225. The Court declined to subscribe to "a bifurcated view of the effects of a single group of pickets at a single site," *id.*, at 222, and rejected "the proposition that a secondary employer's *domestic business activities* may be the basis for Board jurisdiction where the *primary dispute* is beyond the *statutory* authority over unfair labor practices 'affecting commerce,'" *id.*, at 226 (emphasis supplied in part).

3. This Court's decisions in *Windward* and *Mobile* control the resolution of the instant case. These decisions teach that a prerequisite to determining whether union activities violate § 8(b)(4) of the Act is that those activities affect "commerce" in the limited sense used in the Act. Whether union activities affect "commerce" within the meaning of the Act is in turn determined by the character of the basic or primary dispute giving rise to those activities and the implications of those activities for foreign trade and international relations. If the primary dispute is not limited to a controversy over the terms and conditions of employment of American workers and if union activities have potential international implications beyond "the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," *Windward, supra*, at 115, then those activities are for all purposes outside the scope of the Act.

The basic dispute giving rise to the Union activity at issue in this case involved Soviet aggression abroad—a matter completely unrelated to employment conditions of American workers. Union protest took the form of a suspension in the handling of all Russian ships and all cargo bound for or arriving from the Soviet Union. The impact of that action chronicled just in this case involved interference with the importation of Russian wood products (purchased under contract with two Soviet agencies) via shipment by an American company (arranged through a third Soviet agency), resulting in a cutback in trade with the Soviet Union. *Allied International* v. *ILA*,

640 F.2d 1368, 1369-1370, 1375 n. 5 (CA1 1981). The Union's activity thus intruded significantly into the area of world trade and posed delicate issues of foreign diplomacy and international relations. The Union's concerns, moreover, could not be accommodated by some "sort of wage-cost decision benefiting American workingmen," but only by major foreign policy action by the Soviet government. This Court's decisions in *Windward* and *Mobile* make clear that "Congress did not intend to strain through the filament of the NLRA," 419 U.S., at 228, labor activity such as this.

It follows under *Mobile* that the Act leaves unregulated not only the effect of the Union's actions on Soviet trade agencies or on the Soviet government in general, but the effect on the business activities of domestic shippers, stevedores, and importers as well. As the Court held in *Mobile*, it will not permit "a bifurcated view of the effects" of a single labor action. *Id.*, at 222. A "secondary employer's domestic business activities may [not] be the basis for [jurisdiction under the Act] where the primary dispute is beyond [the] *statutory* authority over unfair labor practices 'affecting commerce.'" *Id.*, at 226. The Union activity at issue in this case thus did not affect "commerce" within the meaning of the Act; it follows that the plaintiff has failed to establish a necessary predicate for finding a violation under § 8(b)(4) of the Act, and in turn for sustaining a claim under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187.

4. The First Circuit in this case acknowledged that the Union activity in issue "was inspired by military events in foreign lands—events far beyond NLRB jurisdiction," 640 F.2d, at 1374, but held that this fact did "not counsel against application of the NLRA to the labor dispute ongoing here at home," *ibid.* The First Circuit read *Mobile* "as establishing that in the case of interrelated *labor* disputes, particularly disputes that give rise to similar conduct carried out at a single site,

a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings." *Ibid.* (Emphasis supplied.) In this case, the First Circuit contended, because the "*only* labor-related activity in issue has been played out by an all-American cast," there "is no attempt to 'bifurcate' the effects of a single union action." *Ibid.* (Emphasis in original.)

The First Circuit's conclusion is based on a fundamental misapprehension of this Court's decision in *Mobile*. The thrust of *Mobile*, and of the decisions before it, is that the focus of the Act is on union activity arising from a *domestic* labor dispute, and that the Act should not be construed to reach activity that threatens to intrude into the "delicate field of international relations." A foreign controversy is no more a domestic labor matter and no more in "commerce" if it does not involve foreign labor affairs but concerns, instead, core issues of international political relations. If anything, union activity growing out of such a controversy and having potential implications for that controversy would seem more clearly outside "commerce" and the coverage of the federal labor relations laws, under this Court's reasoning in *Windward* and *Mobile*, than union activity prompted by working conditions of foreign seamen. As the Fifth Circuit held when confronted with essentially this same issue:

> If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that [relief under the Act] could not issue when labor relations are involved but could issue when they are not. . . . When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

Baldovin v. *ILA*, 626 F.2d 445, 453 (CA5 1980). The First Circuit's attempt to distinguish *Mobile* on the

ground that foreign employment is not involved in this case must accordingly fail. *Mobile* compels the conclusion that the Union's activity is outside "commerce" and the scope of the Act. There is no basis, therefore, for scrutinizing that activity under § 8(b)(4) of the Act, or for entertaining respondent's § 303 claim predicated on a violation of § 8(b)(4).

CONCLUSION

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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